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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

EDSON CAMACHO, Plaintiff and Appellant, v. LORRAINE COLVIN et al., as Trustees, etc., Defendants and Respondents.	A132450 (Contra Costa County Super. Ct. No. MSC1000648)

I.

INTRODUCTION

Edson Camacho (appellant) appeals from a judgment entered in favor of respondents Lorraine and Ronald Colvin as trustees of the Colvin Family Trust, following an order granting respondents' motion for judgment on the pleadings without leave to amend. Appellant contends that a valid cause of action was stated in his verified first amended complaint (FAC), and the trial court erred in granting the motion. We agree with respondents that critical allegations in the FAC contradict factual allegations contained in the original verified complaint, and appellant's attempt to "plead around" those allegations fails. Accordingly, we affirm the judgment.

II.

FACTUAL AND PROCEDURAL BACKGROUNDS

Appellant filed his original verified complaint on or about March 16, 2010, against defendants Osvaldina Lima (Lima), respondents, and others, for breach of contract and to

foreclose a mechanic's lien. In the complaint, appellant alleged that Lima was the owner of real property located at 318 32nd Street in Richmond (the 32nd Street Property), and that respondents were lienholders on that property. "On or about October 15, 2006," appellant and Lima entered into a contract by which appellant was to provide labor and material to make certain improvements to the 32 Street Property for a total agreed sum of $201,000. The complaint alleged further that "[d]uring the period October 15, 2006 and continuing," appellant furnished labor and materials used to make improvements to the 32nd Street Property pursuant to the aforementioned contract, and that $81,234 was still owed by Lima for the work and materials. As to respondents, appellant filed a mechanic's lien for the unpaid amount, and sought lien priority against respondents' lien. The complaint was accompanied by a verification signed by appellant under penalty of perjury attesting that he had personal knowledge of the facts in the complaint, and that they were true.

The contract allegedly entered between appellant and Lima was attached to the complaint as Exhibit A, and was purportedly signed by appellant and Lima on October 15, 2006. That contract states: "The work to be performed under this agreement will commence on the 10-15-2006 [*sic*]." The contract further required Lima to obtain all necessary approvals and permits "prior to the commencement of the works [*sic*] to be done." The contract also contained an integration clause requiring any modifications of its terms to be in a writing signed by both parties. The mechanic's lien, which was also attached to the complaint, was recorded on January 28, 2010, more than three years after the contract was entered into.

After filing a verified answer to the complaint, respondents filed a motion for judgment on the pleadings, on the ground that appellant had failed to state a claim for mechanics' lien priority. In the moving papers, respondents averred that Lima was appellant's spouse to whom respondents loaned $200,000 in September 2006 to purchase and develop the 32nd Street Property, which loan was secured by a deed of trust recorded on October 5, 2006. When the improvements were not completed and Lima defaulted on her loan payments in 2007, respondents initiated foreclosure proceedings. Eight days

before the March 24, 2010 trustee's sale was scheduled to take place, appellant filed his complaint for breach of contract and mechanics' lien priority. After appellant's failed attempt to obtain an ex parte temporary restraining order stopping the sale, the property was sold to respondents on March 24, 2010, and a new deed was recorded on March 29, 2010. Thus, respondents argued that any mechanic's lien was extinguished by the trustee's sale. The motion also claimed that appellant's mechanics lien was defective because it failed to comply with Civil Code section 3084, and that it was junior to respondents' lien because it was filed later.

Appellant filed an opposition in propria persona. The text of the opposition, using an exotic font of varying sizes, was largely unreadable. As near as we can discern, appellant claimed that the version of Civil Code section 3084 relied on by respondents did not apply to his lien. He also made reference to the "relation back" doctrine, apparently arguing that, for priority purposes, the recording of the mechanic's lien relates back to the time the work first commenced. At the same time, appellant filed a motion for leave to file the FAC, claiming that the purpose was to make the allegations "more specific." This pleading likewise used an exotic-type font of varying sizes. The motion was opposed by respondents.

Before the motion was heard, the trial court issued an order requiring appellant to file an amended opposition using "at least a 12-point standard business font." When appellant failed to file an amended opposition, the trial court treated the pending motion for judgment on the pleadings as "unopposed." Therefore, the motion was granted, but appellant was also granted leave to file the FAC (in "12-point standard business font"). Appellant's separate motion for leave to file the FAC was dropped from the calendar as "moot."

The verified FAC was filed by appellant on October 25, 2010.[1] On appeal, appellant characterizes the changes from the original verified complaint as the addition of "a small amount of detail," and allegations that the agreement for the work was entered into between appellant and Lima "[p]rior to September 25, 2006," and that certain "site preparation work . . . on the lot" was performed by appellant and his workers "[f]rom September 25, 2006 to September 30, 2006." He claimed the contract that was later signed between himself and Lima on October 15, 2006, included the earlier September 2006 site preparation work. Therefore, he alleged that the work which is the subject of his mechanic's lien actually commenced on September 25, 2006.

Respondents filed a new motion for judgment on the pleadings. The motion reiterated that judgment on the pleadings relating to the original complaint was properly granted because the trustee's sale of the property extinguished appellant's lien, and that his mechanic's lien was junior to that of respondents because it was filed after respondents' lien. As to the new allegation that the work actually started in September 2006, respondents contended that it was "immaterial," because the actual recording date of the liens controlled. In making this argument, respondents asserted that the "relation back" doctrine could apply only if appellant's mechanic's lien had been recorded *before* respondents' lien.

Appellant's in pro. per. opposition to the new motion argued that, although his mechanic's lien was recorded after respondents' lien, legally it had priority over respondents' lien because the FAC alleged that the work commenced before respondents' lien was filed. He also argued that the sale of the property did not extinguish his lien.

Respondents' reply brief countered that: (1) appellant's mechanic's lien could not relate back to September 2006 because Lima did not even own the property then; (2) even if appellant was correct that, for priority purposes, a later recorded mechanic's

[1] The FAC appears to be typed in a font size of 12 or 13, typical for legal pleadings. Also, although the FAC renamed Lima as a defendant, the trial court had earlier ordered the dismissal of her and other originally named defendants who were never served with a summons and complaint.

lien relates back to the date the work commenced, appellant was precluded from making this factual claim now because it contradicted his earlier verified allegations; and (3) as a matter of law, the trustee's sale extinguished any lien rights appellant may have had. Appellant filed a written objection to respondents' argument that he was bound by his earlier verified allegation that the work did not begin until *after* October 15, 2006. He claimed that, because the issue was being raised for the first time in a reply brief, the court should not consider the argument.

The court granted the motion for judgment on the pleadings without a statement of reasons.[2] Judgment was subsequently entered for respondents, and this appeal followed.

III.

LEGAL ANALYSIS

A. Standard of Review

"The standard of review for a motion for judgment on the pleadings is the same as that for a general demurrer: We treat the pleadings as admitting all of the material facts properly pleaded, but not any contentions, deductions or conclusions of fact or law contained therein. . . . We review the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any theory. [Citation.]" (*Dunn v. County of Santa Barbara (*2006) 135 Cal.App.4th 1281, 1298.) We review the trial court's denial of leave to amend for abuse of discretion. (*Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 242.)

Although a number of issues are discussed in the briefs, the principal one is whether appellant was precluded from establishing lien priority by alleging that the work encompassed in the mechanic's lien actually began before respondents' lien was recorded. Respondents do not dispute that if the work actually commenced before their lien was recorded, the subsequently recorded mechanic's lien would have priority. (Civ.

[2] Apparently, the court issued a tentative ruling which neither side contested, thereby making the tentative ruling final. The record does not contain a copy of the tentative ruling, and therefore, we are unable to state if reasons supporting the granting of the motion were set forth in that ruling.

Code, § 3134; *Tesco Controls, Inc. v. Monterey Mechanical Co.* (2004) 124 Cal.App.4th 780, 793.)

However, respondents' main contention is that appellant alleged and admitted in his original complaint that the work did not commence until *after* October 15, which was *after* respondents' lien was filed. Respondents assert that, because of this prior admission, appellant was legally precluded from contradicting these facts in his FAC. We agree, particularly in light of appellant's failure to provide a satisfactory explanation for the inconsistency.

"A complaint may plead inconsistent causes of action [citations], although it be verified, if there are no contradictory or antagonistic facts [citation]." (*Steiner v. Rowley* (1950) 35 Cal.2d 713, 718-719.) " 'Generally, after an amended pleading has been filed, courts will disregard the original pleading. [Citation.] [¶] However, an exception to this rule is found in *Lee v. Hensley* [(1951) 103 Cal.App.2d 697, 708-709 . . .], where an amended complaint attempts to avoid defects set forth in a prior complaint by ignoring them. The court may examine the prior complaint to ascertain whether the amended complaint is merely a sham.' [Citation.] The rationale for this rule is obvious. 'A pleader may not attempt to breathe life into a complaint by omitting relevant facts which made his previous complaint defective.' [Citation.] Moreover, any inconsistencies with prior pleadings must be explained; if the pleader fails to do so, the court may disregard the inconsistent allegations. [Citation.]" (*Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 946.)

In *Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, the plaintiff was struck by a motorist adjacent to the defendant's market. His original complaint alleged that the accident took place on the public street adjacent to the market, and the defendant owed him a duty of care because he was parked in the roadway so he could run into the store and buy a newspaper. (*Id*. at pp. 382-383.) Two successive demurrers were filed by the defendant arguing that the market owed no duty to plaintiff because he was injured in the public roadway, and not on the defendant's property. Both demurrers were

sustained with leave to amend. Plaintiff then filed a second amended complaint, but this time alleged that he was on the market's property when he was injured. (*Ibid.*)

The court rejected the new allegations, relying on an exception to the general rule that requires a court to assume the truth of pleaded facts in deciding the sufficiency of a demurrer. That exception applies "where a party files an amended complaint and seeks to avoid the defects of a prior complaint either by omitting the facts that rendered the complaint defective or by pleading facts inconsistent with the allegations of prior pleadings. [Citations.]" (*Owens v. Kings Supermarket, supra,* 198 Cal.App.3d at pp. 383-384.) Noting that the plaintiff failed to provide a satisfactory explanation for the inconsistency, "[t]he conclusion is inescapable that this amendment was made solely for the purpose of avoiding a demurrer." (*Id*. at p. 384.) Accordingly, the appellate court assumed for purposes of the appeal that the original version of events were factually correct. (*Ibid.*)

Similarly, in *Amid v. Hawthorne Community Medical Group, Inc.* (1989) 212 Cal.App.3d 1383, a surgeon sued a hospital that sent a negative peer review evaluation to an affiliated health insurer, allegedly causing him damages to his reputation. Underlying his claims against the hospital was the allegation that the hospital had breached a written contract with him by making the disclosure. In his original complaint the plaintiff failed to allege that his contract with the defendant contained an express agreement not to disclose the peer review evaluation, claiming it was implied only. Then, in his first amended complaint he alleged that the medical director of defendant made an express oral contract of nondisclosure. In the absence of a satisfactory explanation as to why he changed this allegation, the court held the lower court was justified in concluding that the doctor's breach of contract claim was a "sham." (*Id.* at pp. 1389-1391.)

In this case, appellant does not explain the inconsistencies between the allegations in his original verified complaint and those in his verified FAC; he simply takes the position that the allegations are not inconsistent, but rather are the product of respondents "misreading" the original complaint. This is legal-speak nonsense.

The original complaint clearly alleges that "[d]uring the period October 15, 2006 and continuing" appellant furnished labor and materials used to make improvements to the 32nd Street Property—not *before* October 15.

The contract that appellant appended to the complaint, which also is clear on its face, was entered into on October 15, 2006, and states unambiguously that: "The work to be performed under this agreement will commence on 10-15-2006 [*sic*]." There is nothing in the contract to indicate the work was to commence before October 15.

The contract further required Lima to obtain all necessary approvals and permits "prior to commencement of the works [*sic*] to be done." Lima did not acquire title to the property until October 5, 2006. Thus, until that date she had no standing or ability to obtain "approval and permits" to perform construction work on property she did not then own.

The contract also contained an integration clause requiring any modifications of its terms to be in a writing signed by both parties. Extrinsic evidence cannot be used to contradict or supplement an agreement if the contract is intended to be a final expression of the parties' agreement. It may only be used to explain or interpret ambiguous language. (Code Civ. Proc., § 1856, subds. (b), (g).) "Generally, finality may be determined from the writing itself. If on its face the writing purports to be a complete and final expression of the agreement, parol evidence is excluded. [Citations.]" (*Pollyana Homes, Inc. v. Berney* (1961) 56 Cal.2d 676, 679-680.) The contract is not ambiguous, and it is facially a complete and final embodiment of the parties' construction agreement. Any changes to its terms were required to be made in a writing signed by the parties, including a purported change to the work commencement date to a date prior to Lima's ownership of the subject property.

Under these circumstances, there is no doubt that the clearly contradictory "omission, substitution, or contradiction of an original allegation carries with it the onus of untruthfulness." (*Avalon Painting Co. v. Alert Lbr. Co.* (1965) 234 Cal.App.2d 178, 184.) For these reasons, as did the appellate courts in *Owens* and *Amid*, we disregard the factual inconsistencies in the FAC from those in the original complaint and hold

appellant to the first version of events he swore were truthful. That being the case, we conclude that his mechanic's lien was junior, or subordinate, to the lien recorded by respondents several years earlier, and he has failed to state a claim to enforce his lien against respondents.[3]

IV.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

_____
RUVOLO, P. J.

We concur:

_____
REARDON, J.

_____
RIVERA, J.

[3] Because we reach this conclusion we need not, and do not, decide the alternative theories asserted by respondents under which it is argued that their lien had priority over appellant's lien.